

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. _____

GUNSTER, YOAKLEY & STEWART,
P.A., and UNITED STATES SUGAR
CORPORATION,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF
THE INTERIOR,

Defendant.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, Gunster, Yoakley & Stewart, P.A. (“Gunster”), and United States Sugar Corporation (“USSC”), by and through undersigned counsel, hereby file this Complaint seeking declaratory and injunctive relief pursuant to the Freedom of Information Act, against the United States Department of the Interior (“DOI”), and state:

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, for injunctive and declaratory relief.
2. Plaintiffs challenge violations of FOIA by Defendant DOI and the U.S. DOI Office of Everglades Restoration Initiatives (“OERI”) (acting on behalf of DOI) in connection with Plaintiffs’ FOIA request for records related to communications and calendar appointments of two OERI staff members. Defendant has failed to make the determination required by FOIA within

the statutorily prescribed time period and also has failed to produce promptly all responsive, non-exempt documents as the statute requires.

3. This case seeks declaratory relief that DOI is in violation of FOIA and injunctive relief ordering Defendant DOI to immediately and fully comply with Defendant's FOIA obligations and produce the requested records.

JURISDICTION AND VENUE

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B). The Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346.

5. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201, *et seq.*

6. Venue is proper before this Court pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

PARTIES

7. Plaintiff Gunster is a commercial law firm with thirteen offices throughout Florida. It offers legal counsel to clients in a wide range of practice areas. It submitted the FOIA request at issue in this case on behalf of its client USSC. Gunster's headquarters is located in West Palm Beach within this District.

8. Plaintiff USSC is one of America's premier privately held agribusiness companies. Its headquarters is in Clewiston, Florida. USSC is the country's largest producer of sugar cane and refined cane sugar and is one of Florida's major producers of oranges and orange juice products.

9. USSC, through Gunster, requested the agency records that DOI and OERI have failed to produce.

10. Defendant DOI is an agency within the meaning of 5 U.S.C. § 552(f), and as such may be named as a Defendant pursuant to 5 U.S.C. § 552(a)(4)(B). OERI is an administrative component of Defendant DOI and is responsible for coordinating DOI's restoration responsibilities in the Florida Everglades. OERI's office is located in Davie, Florida, and the OERI staff members from whom Plaintiffs seek the requested records work in OERI's office in Davie, Florida.

11. DOI and its administrative component, OERI, have possession and control of the requested records. Defendant DOI is responsible for fulfilling Plaintiffs' FOIA request.

STATUTORY AND REGULATORY FRAMEWORK

12. FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

13. FOIA imposes strict and rigorous deadlines on federal agencies. An agency must make and communicate its "determination" whether to comply with a FOIA request and communicate "the reasons therefore" within 20 working days of receiving the request, or within 30 working days in "unusual circumstances," and notify the requester of its right to appeal the agency's determination. 5 U.S.C. § 552(a)(6)(A)(i) and (a)(6)(B)(i). If the agency determines that the records are not exempt from public disclosure, the agency is required to make the requested records "promptly available" to the requester. *Id.* at § 552(a)(3)(A).

14. A "determination" within the meaning of § 552(a)(6)(A)(i) requires that:

within the relevant time period, an agency must *determine whether to comply with a request* – that is, whether a requester will *receive all the documents the requester seeks*. It is not enough that within the relevant time period, the agency simply decided to later decide. Therefore, within the relevant time period, the agency *must* at least *inform the requester of the*

documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.

CREW v. Federal Election Com'n, 711 F.3d 180, 186 (D.C. Cir. 2013) (emphasis added). A “determination does not require actual *production* of the records to the requester at the exact time that the ‘determination’ is communicated to the requester . . . [however,] within 20 working days, an agency *must process* a FOIA request and make a ‘determination.’” *National Day Laborer Organizing Network v. United States Immigration & Customs Enforcement*, 236 F. Supp. 3d 810, 815 (S.D.N.Y. 2017) (quoting *CREW*, 711 F.3d at 188-89) (emphasis added in part).

15. In “unusual circumstances,” an agency may delay its response to a FOIA request or appeal, but it must provide notice “setting forth the unusual circumstances for such extension,” and “the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B). However, “[n]o such notice shall specify a date that would result in an extension for more than ten working days.” *Id.*

16. The DOI “use[s] processing tracks to distinguish simple requests from more complex [requests].” 43 C.F.R. § 2.15(a). Regardless of whether or not a request is designated as “complex,” the “use of multitrack processing does not alter the statutory deadline for a bureau to determine whether to comply with [a] FOIA request.” 43 C.F.R. § 2.15(f).

17. A FOIA requester must generally exhaust administrative appeal remedies before seeking judicial redress, unless the agency fails to adhere to certain statutory timelines in responding to a FOIA request, in which case, the requester is deemed by statute to have fulfilled the exhaustion requirement. *See* 5 U.S.C. § 552(a)(6)(C)(i). In other words, “[w]hen a requester does not receive a determination within 20 days, or 30 days under ‘unusual circumstances,’ 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(B)(i), the requester is deemed to have exhausted its administrative remedies and may therefore file suit against the agencies that have not responded.” *Miccosukee*

Tribe of Indians of Florida v. U.S. Dept. of Justice, 103 F. Supp. 3d 1314, 1326 (S.D. Fla. 2015) (citing *CREW*, 711 F.3d at 182). “Constructive exhaustion occurs when certain statutory requirements are not met by the agency.” *Id.* (quoting *Taylor v. Appleton*, 30 F.3d 1365, 1368 (11th Cir. 1994)).

18. The 20-day period may be tolled by the agency “if necessary to clarify with the requester issues regarding fee assessment,” but “the agency’s receipt of the requester’s response to the agency’s request for information or clarification *ends the tolling period.*” 5 U.S.C. § 552(a)(6)(A)(ii)(II) (emphasis added).

19. This Court has jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

FACTUAL BACKGROUND

20. On November 16, 2018 Plaintiff Gunster, acting as counsel for Plaintiff USSC, submitted a FOIA request (attached as **Exhibit A**) via electronic mail to DOI and DOI’s OERI district office in Davie, Florida requesting two categories of records from 5 custodians (subsequently limited to 2 custodians):

1. From March 1, 2018 to present, all emails, text messages, and mobile/smart phone application messages to or from the following, identified OERI staff in Part 1 .A. below and pertaining to the listed terms in Part 1.B. below:

A. OERI Staff:

- a. Kevin Burger
- b. Allyn Childress
- c. Dennis Duke
- d. Joan Lawrence
- e. Sandy Soto

B. Search Terms and Topics of Interest:

- a. “EAA Storage Reservoir”
- b. “PACR”

- c. "Senate Bill 10"
- d. "SB 10"
- e. "Section 203"
- f. "Water Resource Development Act"
- g. "WRDA"
- h. "Appendix A"
- i. "Settlement Agreement"
- j. "Consent Decree"
- k. "Restoration Strategies"
- l. "Combined Operating Plan"
- m. "COP"
- n. "Modified Waters"
- o. "Mod Waters"
- p. "Increments 2 and 3"
- q. "ERTP"
- r. "Everglades Restoration Transition Plan"
- s. "Cape Sable Seaside Sparrow"
- t. "CSSS"
- u. "Northeast Shark River Slough"
- v. "NESRS"
- w. "Integrated Delivery Schedule"
- x. "IDS"
- y. "National Academies of Science"
- z. "Biennial Report"
- aa. "CISRERP"
- bb. "LOWRP"
- cc. "Blue Green Algae"
- dd. "Cyanobacteria"
- ee. "South Florida Ecosystem Restoration Task Force"
- ff. "Task Force"
- gg. "LORS"
- hh. "Lake Okeechobee"
- ii. "Deep Injection Wells"
- jj. "DWI"
- kk. "DIW"
- ll. "Emergency Estuary Protection"
- mm. "EEP"
- nn. "S-12"

2. From January 1, 2018 to present, all calendar appointments included on the calendars of the listed OERI staff in Part 2.A. below:

A. OERI Staff:

- a. Kevin Burger
- b. Allyn Childress
- c. Dennis Duke

d. Joan Lawrence
e. Sandy Soto

21. On November 29, 2018, Plaintiffs received an acknowledgement of receipt of their FOIA request from DOI (“Acknowledgement Letter”) (attached hereto as **Exhibit B**). In its Acknowledgement Letter, DOI stated that Plaintiffs’ FOIA request was received by DOI on November 20, 2018 and was assigned tracking number OS-2019-00199. *See Exhibit B.*

22. In addition, DOI’s Acknowledgement Letter stated that it needed further “specific clarification regarding the fee category,” and that it could not process the request until it knew “more information about your fee category.” *See Exhibit B.*

23. DOI’s Acknowledgement letter did not contain a “determination” indicating whether or not it intended to comply with Plaintiffs’ FOIA request and produce non-exempt records. Nor did the Acknowledgement letter set forth any “unusual circumstances” to extend the 20 day response period to 30 working days pursuant to 5 U.S.C. § 552(a)(6)(B).

24. On November 30, 2018, Plaintiffs responded in writing via electronic mail to DOI’s request for additional information regarding Plaintiffs’ fee category and stated that DOI could “consider this a commercial use request for the purpose of determining fees.” (A copy of this letter is attached hereto as **Exhibit C.**)

25. From November 30, 2018 until January 28, 2019, Plaintiffs did not receive any further communications from DOI.

26. Plaintiffs contacted DOI on January 28, 2019 to follow up on their FOIA request. Plaintiffs spoke to the DOI FOIA Office in Washington, D.C. A DOI representative stated that the D.C. office was still waiting on records from the OERI Florida office, and further stated that she would confirm the request had been sent to the OERI office and whether they were searching for records. DOI did not provide any timeframe for the processing of Plaintiffs’ request.

27. On January 29, 2019, DOI sent a letter via electronic mail to Plaintiffs indicating that DOI had classified Plaintiffs as “commercial use” requesters and that DOI estimated it would cost approximately \$25,000.00 to process the request. (A copy of that letter is attached hereto as **Exhibit D.**) This was the first communication Plaintiffs received from DOI since DOI’s November 29, 2018 Acknowledgement Letter.

28. Following receipt of this cost estimate from DOI, Plaintiffs communicated by phone and via email with a FOIA processor in the DOI FOIA Office in Washington, D.C., regarding DOI’s estimated cost of \$25,000.00 and possible ways to narrow the request to reduce cost.

29. In particular, on January 30, 2019, Plaintiffs requested via email that DOI provide an estimated cost for records of just two of the five OERI staff members for whom records were originally requested.

30. On January 31, 2019, DOI responded that the cost for those two OERI staff members would be approximately \$5,000.00. On that same day, Plaintiffs provided “written assurance” of their “willingness to pay at least \$5,000 for the responsive records” for those two individuals.

31. To date, DOI has failed to provide a “determination” within the meaning of 5 U.S.C. § 552(a)(6)(A)(i) and applicable federal case law, and Plaintiffs have not received any documents from DOI in response to their November 16, 2018 FOIA request. DOI is thus in ongoing violation of FOIA’s requirement that it provide a determination of whether it will comply with the request within the statutorily required 20-day period.

32. As of the date of the filing of this Complaint, DOI’s FOIA request tracking system indicates an “estimated processing completion date” of February 11, 2019. (A copy of the tracking

report for Plaintiffs' FOIA request is attached hereto as **Exhibit E.**) However, February 11, 2019 has come and gone, and DOI has not issued a determination on Plaintiffs' FOIA request, nor provided any documents in response to Plaintiffs' FOIA request.

33. Plaintiffs' counsel again contacted DOI on February 7, 2019 by phone and via email regarding the status of Plaintiffs' FOIA request, DOI responded that day that the Florida office was working on searching for records and that Plaintiffs should "wait a month before checking in with us again." (A copy of this letter is attached hereto as **Exhibit F.**) DOI thus has been unable even to commit to making the unlawfully withheld determination by a particular date.

34. The statutory time limit for DOI to issue a "determination" on Plaintiffs' FOIA request has expired, and therefore, Plaintiffs have constructively exhausted the applicable administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C); *see also* CREW, 711 F.3d at 180; *Miccosukee*, 103 F. Supp. 3d at 1326. Specifically, Plaintiffs are deemed to have exhausted required administrative remedies because DOI failed to make and communicate a "determination" as to whether it intended to comply with Plaintiffs' request, inform Plaintiffs of the scope of the documents it intended to produce, and inform Plaintiffs of the scope of documents the agency planned to withhold under any FOIA exemptions within 20 working days of receiving Plaintiffs' FOIA request. DOI has failed to meet the required deadline even assuming the application of a tolling period during the parties' discussions about cost because it has been well over 20 days since all cost issues were resolved.

35. All conditions precedent to bringing the claims below have been satisfied or waived.

PLAINTIFFS' CLAIM FOR RELIEF

CLAIM ONE

(Wrongful Failure to Make Determination and Produce Responsive, Non-Exempt Records)

36. Plaintiffs hereby re-allege and reassert the allegations contained in Paragraphs 1-35 as if fully set forth herein.

37. Plaintiffs properly requested records within DOI's custody and control in accordance with FOIA.

38. On November 16, 2018, Plaintiffs submitted a FOIA request to Defendant DOI and its administrative component OERI, which was received by DOI on November 20, 2018.

39. Plaintiffs have a statutory right to the records they seek, which are "agency records" within the meaning of FOIA.

40. As of the date of this Complaint, Defendant and its administrative component OERI have failed to make any determination on Plaintiffs' FOIA request and have failed to produce any responsive records.

41. Defendant has violated FOIA by failing to make promptly available the records sought by the foregoing requests as required by 5 U.S.C. § 552(a)(3)(A) and Defendant's corresponding regulations.

42. Defendant has violated FOIA by failing to make a determination as to the foregoing requests within the time limits prescribed by 5 U.S.C. § 552(a)(6)(A) and Defendant's corresponding regulations.

43. Because Defendant failed to comply with the time-limit provisions of 5 U.S.C. § 552(a)(6)(A), Plaintiffs have constructively exhausted their administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C)(i).

44. Therefore, Plaintiffs are entitled to injunctive and declaratory relief with respect to the immediate processing and disclosure of the requested records.

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. Declare that DOI is in violation of the Freedom of Information Act by failing to issue a determination on Plaintiffs' request within the statutorily required time period and by failing to produce promptly all responsive, non-exempt documents;
- b. Order DOI to complete the processing of Plaintiffs' request, issue a determination, and promptly produce all responsive, non-exempt documents to Plaintiffs;
- c. Maintain jurisdiction over this action until DOI complies with the Freedom of Information Act and this Court's Order(s);
- d. Award Plaintiffs their attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- e. Grant such additional and further relief as the Court may deem just and proper.

Dated: March 28, 2019

Respectfully submitted,

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